

**A Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor
and other appeals (No 1)**

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL
NOS 05(L)-289-12 OF 2021(W), 05(L)-290-12 OF 2021(W) AND
05(L)-291-12 OF 2021(W)
TENGKU MAIMUN CHIEF JUSTICE, ABANG ISKANDAR CJ (SABAH
AND SARAWAK), NALLINI PATHMANATHAN, MARY LIM AND
MOHAMAD ZABIDIN FCJJ
C 23 AUGUST 2022

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant and counsel though present in court deliberately refused to submit at appeal hearing — Whether situation akin to appellant 'not appearing to support his appeal' in s 313(2) of Criminal Procedure Code — Whether court was empowered to determine appeal based on the appeal records, submissions of the parties and the written judgments of the courts below — Whether trial judge properly evaluated all the evidence and was not plainly wrong in finding appellant guilty — Whether defence's case was so inconsistent, incoherent and incredible that it was unworthy of belief — Whether defence failed to create reasonable doubt on prosecution's case — Whether appellant's conviction on all charges was safe — Whether sentence imposed was not manifestly excessive

F The instant appeals by the appellant, a former Prime Minister of Malaysia, was against the Court of Appeal's dismissal of his appeal against conviction and sentence by the High Court on seven criminal charges — one charge of abuse of power under s 23 of the Malaysian Anti-Corruption Commission Act 2009, three charges of criminal breach of trust under s 409 of the Penal Code and
G three charges of money laundering under s 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. The appellant was sentenced to a total concurrent jail term of 12 years on all the charges and ordered to pay a fine of RM210m, in default five years' jail. Although the instant appeals were fixed in April 2022 for hearing
H over nine days in August 2022, the appellant changed his lawyers in late July. When the appeals came up for hearing, his new lead counsel sought an adjournment of 'three to four months' since he had only recently taken over conduct of the matter and had insufficient time to prepare for the appeal. When the request was denied, counsel applied to discharge himself from acting
I for the appellant but this request was also denied to prevent the appellant from being left unrepresented in the proceedings. Thereafter, although counsel remained in court throughout the rest of proceedings until its conclusion, he refused to make any submissions in respect of the appeals even after the court, against the norm, called on the respondent to make his submissions first in

order to give appellant's counsel time to prepare his submissions. Since the appellant and his counsel were both present in court but refused to participate in the appeal hearing, the court proceeded to decide on the appeals after considering the appeal records, the submissions of the parties and the written judgments of the courts below.

Held, unanimously dismissing the appeals and affirming the conviction and sentence:

- (1) The situation that the court was faced with mirrored a position similar to that envisaged in s 313(2) of the Criminal Procedure Code in that whilst the appellant and his counsel were physically present they deliberately refused to participate in the appeal hearing. This was equivalent to the appellant 'not appearing to support' his appeals. Although s 313 applied to criminal appeals to the High Court, there was no reason why it ought not to apply analogously to appeals to the Federal Court from the Court of Appeal. In the circumstances, the court was empowered to proceed with the appeals (see also s 92 of the Courts of Judicature Act 1964) (see paras 20–21).
- (2) Not being discharged, the counsel was under a continuing duty to protect the appellant's prosecution of the appeals by submitting on the merits of the same. He was invited repeatedly to submit but he persistently refused to do so (see paras 18–19).
- (3) The trial judge had undertaken an extensive analysis of all the evidence, both documentary and oral, that surfaced before him over the 86 or so days of trial. The Court of Appeal had meticulously examined those findings and found no appealable errors. This court's role was not to make any new findings of fact on the evidence on record or to substitute those findings with its own. Where there were concurrent findings of fact by the courts below, the apex court would not be inclined to disturb those findings unless it was shown that they were perverse. All appellants in criminal appeals must understand that the burden was on them in the apex court to show that the concurrent findings of the courts below were perverse and had occasioned a miscarriage of justice and that the apex court had to intervene and correct those findings, resulting in an outright acquittal or an order for retrial — depending on the circumstances (see paras 24–26).
- (4) A close examination of the grounds of appeal showed that the appellant's complaints were essentially that the Court of Appeal had erred in law and fact in finding that the trial judge had: (a) correctly found that the prosecution had made out a prima facie case on all the seven charges; and (b) correctly appreciated the defence's case. The trial judge had undertaken a very detailed and objective analysis of the evidence to support his findings at the close of the prosecution's case. In the

- A circumstances, this court failed to see how and where any of the trial judge's findings leading to the ultimate finding that a prima facie case had been made out, were perverse. The trial judge correctly held that all the ingredients of the seven charges were established at the close of the prosecution's case. The appellant was thus rightly called upon to enter his
- B defence on all the seven charges (see paras 28–31).
- (5) During the trial, the appellant did not dispute that RM42m had entered his personal bank accounts and there was documentary evidence to show that he had spent the entire sum. The thrust of the defence was that the
- C appellant did not know that the funds were from SRC. The respondent maintained that the defence was inconsistent, incoherent and unworthy of belief because whilst the appellant, on the one hand, denied knowledge of the source of the funds, he maintained, on the other hand, that he had been framed in a conspiracy hatched between Jho Low, Azlin Alias, Nik Faisal Ariff Kamil and the bankers. The appellant also maintained that the monies that were credited into his personal AmIslamic Bank Account Nos 880 and 906 (which were the subject of six of the charges) were received from Arab donations from Saudi Arabia. The respondent had always maintained that these defences were completely inconsistent and
- D diametrically opposed to one another. The respondent submitted that the trial judge had correctly evaluated the defence's case and did not believe its narrative (see paras 32–35).
- (6) The trial court's findings on the defence were correct. In concluding that the defence failed to raise a reasonable doubt on the prosecution's case, the trial judge had undertaken a thorough analysis of the evidence produced by the defence. This court was unable to conclude that any of the findings of the trial court, as affirmed by the Court of Appeal, were
- E perverse or plainly wrong so as to warrant appellate intervention. The defence was so inherently inconsistent and incredible that it did not raise a reasonable doubt on the prosecution's case (see paras 36–37).
- (7) In the circumstances, and having pored through the evidence, the submissions and the rest of the records of appeal, this court found that the appellant's complaints as contained in the petition of appeal were devoid
- F of any merit. On the totality of the evidence, the conviction of the appellant on all the seven charges was safe. The sentence imposed was not manifestly excessive (see para 38).
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[Bahasa Malaysia summary]

- I Rayuan ini difailkan oleh perayu, bekas Perdana Menteri Malaysia, atas keputusan Mahkamah Rayuan terhadap sabitan dan hukuman oleh Mahkamah Tinggi atas tujuh pertuduhan jenayah — satu pertuduhan salah guna kuasa di bawah s 23 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009, tiga pertuduhan pecah amanah jenayah di bawah s 409 Kanun

Keseksaan dan tiga pertuduhan pengubahan wang haram di bawah s 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001. Perayu dijatuhkan hukuman penjara maksimum 12 tahun bagi kesemua pertuduhan dan diperintahkan membayar denda RM210 juta, jika gagal bayar penjara lima tahun. Walaupun rayuan ini ditetapkan pada April 2022 untuk pendengaran selama sembilan hari pada Ogos 2022, perayu menukar peguamnya pada akhir Julai. Ketika pendengaran rayuan tersebut, peguam utamanya yang baru memohon penangguhan 'tiga hingga empat bulan' kerana beliau baru sahaja mengambil alih kes tersebut dan tidak mempunyai masa yang mencukupi untuk berhujah ketika prosiding rayuan tersebut. Apabila permohonan penangguhan tersebut ditolak, peguam memohon untuk melepaskan dirinya daripada bertindak bagi perayu tetapi permohonan ini juga ditolak untuk menghalang perayu daripada dibiarkan tidak diwakili di dalam prosiding tersebut. Selepas itu, walaupun peguam kekal di mahkamah sepanjang prosiding sehingga selesai, beliau enggan membuat sebarang hujahan berkenaan dengan rayuan tersebut walaupun selepas mahkamah, bertentangan dengan keadaan biasa, meminta responden membuat penghujahannya terlebih dahulu untuk memberi masa kepada peguam perayu untuk menyediakan penghujahannya. Oleh kerana perayu dan peguamnya kedua-duanya hadir di mahkamah tetapi enggan berhujah pendengaran rayuan itu, mahkamah terus memutuskan rayuan tersebut selepas mempertimbangkan rekod rayuan, hujahan pihak-pihak dan penghakiman bertulis mahkamah di bawah.

Diputuskan, sebulat suara menolak rayuan-rayuan dan mengekalkan sabitan dan hukuman:

- (1) Situasi yang dihadapi mahkamah mencerminkan kedudukan yang sama seperti yang diperuntukkan di dalam s 313(2) Kanun Tatacara Jenayah yang mana perayu dan peguamnya hadir secara fizikal dan enggan secara sengaja berhujah ketika pendengaran rayuan tersebut. Hal ini bersamaan dengan perayu 'tidak hadir untuk menyokong' rayuannya. Walaupun s 313 terpakai untuk rayuan jenayah ke Mahkamah Tinggi, tiada sebab mengapa ianya tidak boleh terpakai untuk rayuan ke Mahkamah Persekutuan dari Mahkamah Rayuan. Dalam keadaan ini, mahkamah diberi kuasa untuk meneruskan rayuan tersebut. Lihat juga s 92 Akta Mahkamah Kehakiman 1964 (lihat perenggan 20–21).
- (2) Apabila tidak dilepaskan, peguambela bertanggungjawab secara berterusan untuk mewakili perayu terhadap rayuan tersebut dengan mengemukakan merit-meritnya. Beliau telah dijemput berulang kali untuk berhujah namun masih enggan berbuat demikian (lihat perenggan 18–19).
- (3) Hakim bicara telah melakukan penelitian menyeluruh terhadap semua keterangan, sama ada secara dokumentari dan lisan, yang dikemukakan

- A di hadapannya sepanjang 86 hari perbicaraan. Mahkamah Rayuan telah meneliti dapatan tersebut dengan teliti dan mendapati tiada kesilapan yang boleh dirayu. Peranan mahkamah ini bukanlah untuk membuat sebarang penemuan fakta baru mengenai keterangan-keterangan dalam rekod atau menggantikan penemuan tersebut dengan sendirinya.
- B Sekiranya terdapat penemuan fakta serentak oleh mahkamah di bawah, mahkamah tertinggi tidak akan cenderung untuk mengganggu penemuan tersebut melainkan berlawanan. Semua perayu dalam rayuan jenayah mesti memahami bahawa beban adalah terletak pada mereka di mahkamah tertinggi untuk menunjukkan bahawa penemuan mahkamah-mahkamah di bawah adalah berlawanan dan telah menyebabkan ketidakadilan yang mana mahkamah tertinggi harus campur tangan dan membetulkan penemuan tersebut, menyebabkan perayu dibebaskan atau mengeluarkan perintah untuk perbicaraan semula — bergantung kepada keadaan-keadaan (lihat perenggan 24–26).
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- (4) Penelitian terhadap alasan-alasan rayuan menunjukkan bahawa alasan-alasan perayu secara amnya adalah bahawa Mahkamah Rayuan telah terkhilaf dari segi undang-undang dan fakta dalam mendapati bahawa hakim perbicaraan telah: (a) dengan betul mendapati bahawa pihak pendakwaan telah membuat kes prima facie bagi kesemua tujuh pertuduhan tersebut; dan (b) meneliti kes pembelaan. Hakim perbicaraan telah menjalankan penelitian keterangan-keterangan yang sangat terperinci dan objektif untuk menyokong penemuannya pada akhir kes pendakwaan. Dalam keadaan ini, mahkamah ini gagal melihat bagaimana dan di sebarang dapatan hakim bicara yang membawa kepada dapatan muktamad bahawa kes prima facie telah dibuat, adalah berlawanan. Hakim perbicaraan dengan betul memutuskan bahawa semua elemen daripada tujuh pertuduhan tersebut dibuktikan pada akhir kes pendakwaan. Oleh itu, perayu berhak dipanggil untuk membela diri bagi kesemua tujuh pertuduhan tersebut (lihat perenggan 28–31).
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- (5) Ketika perbicaraan, perayu tidak mempertikaikan bahawa RM42 juta telah dimasukkan ke akaun bank peribadinya dan terdapat keterangan dokumentari untuk menunjukkan bahawa dia telah membelanjakan keseluruhan jumlah wang tersebut. Alasan pembelaan yang utama adalah perayu tidak mengetahui bahawa dana tersebut adalah daripada SRC. Responden berpendapat bahawa pembelaannya tidak konsisten, tidak masuk akal dan tidak boleh dipercayai kerana walaupun perayu, di satu pihak, menafikan pengetahuan mengenai sumber dana tersebut, beliau juga menyatakan bahawa terdapat konspirasi antara Jho Low, Azlin Alias, Nik Faisal Ariff Kamil dan pegawai bank. Perayu juga menegaskan bahawa wang yang dikreditkan ke dalam akaun bank AmIslamic peribadinya No 880 dan 906 (yang menjadi perkara asas enam tuduhan)

- merupakan derma daripada orang Arab dari Arab Saudi. Responden sentiasa menegaskan bahawa pembelaan ini sama sekali tidak konsisten dan bertentangan antara satu sama lain. Responden menghujahkan bahawa hakim perbicaraan telah menilai dengan betul kes pembelaan dan tidak mempercayai naratifnya (lihat perenggan 32–35). A
- (6) Dapatan mahkamah bicara terhadap kes pembelaan adalah betul. Dalam membuat kesimpulan bahawa pihak pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan, hakim bicara telah meneliti secara menyeluruh terhadap semua keterangan yang dikemukakan oleh pihak pembelaan. Mahkamah ini tidak dapat membuat kesimpulan bahawa mana-mana penemuan mahkamah perbicaraan, seperti yang disahkan oleh Mahkamah Rayuan, adalah berlawanan atau jelas salah untuk menjamin campur tangan rayuan. Pihak pembelaan sememangnya tidak konsisten dan tidak menimbulkan keraguan munasabah terhadap kes pendakwaan (lihat perenggan 36–37). B
- (7) Dalam keadaan ini, setelah meneliti semua keterangan, penghujahan dan rekod rayuan yang lain, mahkamah mendapati bahawa alasan-alasan rayuan di dalam petisyen rayuan tidak mempunyai sebarang merit. Berdasarkan keseluruhan keterangan, sabitan perayu bagi kesemua tujuh pertuduhan tersebut adalah selamat. Hukuman yang dikenakan adalah tidak berlebihan (lihat perenggan 38).] C
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Cases referred to

- Dato' Sri Mohd Najib bin Hj Abd Razak v PP* [2022] 1 MLJ 137, CA (refd) F
- Go Pak Hoong Tractor and Building Construction v Sykt Pasir Perdana* [1982] 1 MLJ 77, FC (refd)
- Hayati bte Aizan v PP* [2000] 1 MLJ 359, HC (refd)
- Lee Kwan Woh v PP* [2009] 5 MLJ 301, FC (distd)
- Mohamed bin Abdullah v PP* [1980] 2 MLJ 201 (refd)
- Mohd Zulkifli bin Md Ridzuan v PP* [2014] 1 MLJ 257, CA (refd) G
- Nordin Hamid & Co v Pathmarajah & Anor* [1990] 2 MLJ 308, HC (refd)
- PP v Dato' Sri Mohd Najib bin Hj Abd Razak* [2020] 11 MLJ 808, HC (refd)
- PP v Tanggaah* [1972] 1 MLJ 207 (refd)
- Puganeswaran all Ganesan & Ors v PP and other appeals* [2020] 12 MLJ 165, FC (refd) H
- Tan Teow Swee v Regina* [1955] 1 MLJ 76 (refd)

Legislation referred to

- Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 4(1)(b) I
- Courts of the Judicature Act 1964 s 92
- Criminal Procedure Code s 313, 313(2)
- Malaysian Anti-Corruption Commission Act 2009 s 23
- Penal Code s 409

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Hisyam bin Abdullah @ Teh Poh Teik (with Kee Wei Lon and Low Wei Loke) (Hisyam Teh) for the appellant.

V Sithambaram (Donald Joseph Franklin, Sulaiman Kho Kheng Fuei, Mohd Ashrof Adrin Kamarul and Manjira Vasudevan) (Attorney General's Chambers) for the respondent.
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Tiu Foo Woei (Azri, Lee Swee Seng & Co) watching brief for Bar Council.

**Tengku Maimun Chief Justice, Abang Iskandar CJ (Sabah and Sarawak),
Nallini Pathmanathan, Mary Lim and Mohamad Zabidin FCJJ:**

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INTRODUCTION

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[1] The appellant in this case is the former Prime Minister of Malaysia, Dato' Sri Mohd Najib bin Hj Abdul Razak. He was charged with seven offences against his conduct in relation to a company called SRC International Sdn Bhd ('SRC'). The High Court found him guilty and convicted him on all seven charges. The sentence imposed on the appellant is an aggregate concurrent custodial sentence of twelve years and a fine of RM210m (in default five years' imprisonment). The Court of Appeal affirmed the conviction on all seven charges and the sentence imposed. In these three appeals before us, the
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appellant challenges the conviction and sentence.

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[2] We must state that the respondent has not challenged the measure of the sentence imposed against the appellant.

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[3] The seven charges against the appellant are, in summary, simply these. The first charge relates to abuse of power under s 23 of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act 2009'). The next three charges are on criminal breach of trust under s 409 of the Penal Code while the last three charges are under s 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFAPUAA 2001').

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[4] At the outset, we state that counsel for the appellant, Tuan Hj Hisyam Teh, impressed upon us with considerable fervour that these appeals concern strong serious points of law and fact. In point of fact, we find that there is nothing complex in these appeals. Putting aside the personality of the appellant, this is a simple and straightforward case of abuse of power, criminal
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breach of trust and money laundering.

[5] The trial itself took an aggregate number of at least 86 days (57 for the prosecution case and 29 days for the defence). It is understandable that the trial took that long because of the number of witnesses involved, the sheer number

of documents and due to the fact that a great part of the trial took place during the Covid-19 pandemic. However, these considerations do not in themselves render the case complex.

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[6] The area of the law is very much settled. There is an abundance of cases on abuse of power under the MACC Act 2009 and money laundering under the AMLATFAPUAA 2001. The Penal Code too, was first enacted in 1936 and s 409 and the entire body of law on criminal breach of trust has developed since then. There are to our minds, no novel legal issues on this area of the law. The issues in these appeals mostly concern findings of fact and the application of settled law to the facts. It bears mentioning, and this will be elaborated in greater detail later, that as the apex court, our role is not to make new findings of fact but to consider whether the existing findings and the application of the law to the facts are correct.

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[7] Before we proceed to state our decision, we must first address some preliminary issues.

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PRELIMINARY ISSUES

Counsel for the appellant's refusal to make submissions

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[8] These appeals were fixed for hearing on the 15 August to the 19 August 2022 and the 23 August to the 26 August 2022. This constitutes a total of nine days.

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[9] The first two days of the appeal, the 15–16 August 2022, were spent on the appellant's motions to adduce additional evidence. We considered the motions and on 16 August 2022, after careful deliberation, we unanimously dismissed them with written grounds stating our reasons for doing so. On the same day 16 August 2022, we instructed parties to proceed with the substantive merits of the appeals. Tuan Hj Hisyam Teh, counsel for the appellant then stated that he and his team, being the new lawyers for the appellant, were not prepared to argue the appeals and moved to adjourn the appeals for three to four months.

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[10] We stood down to consider the application for adjournment and on 16 August 2022 itself, we refused the adjournment and provided our written grounds stating our reasons. In those written broad grounds, we set out the procedural history leading up to the appeals and how parties were well aware that the appeals will proceed as scheduled and that the reason of not being ready to argue the appeals would not be accepted. While the appellant was entitled to change his counsel from Messrs Shafee & Co to Messrs Zaid Ibrahim Suflan TH Liew & Partners, he did so mindful of the date of the

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A appeals. He cannot then turn around and say, having changed them so late in the day and counsel having accepted the brief when they did, that new counsel and solicitors are not ready. In any event, we decided to commence the hearing on 18 August 2022 (Thursday) so as to allow counsel for the appellant time to
B organise themselves.

[11] On the morning of 18 August 2022, counsel for the appellant moved to
C adjourn the appeals on the same ground namely that he and his team were not prepared. We rejected this ground. With the adjournment refused, Tuan Hj Hisyam Teh then moved to discharge himself as counsel for the appellant. We
D keep in mind that the court possesses inherent jurisdiction to ensure that it can fulfil its mandate to administer justice, to prevent any abuse of process, and to ensure the machinery of the courts function in an orderly and effective manner. As counsel are key actors in the administration of justice, the court has
E supervisory jurisdiction and authority to exercise inherent and supervisory control over counsel when necessary to protect its process. Hence, the court, in invoking its inherent jurisdiction, refused counsel's application to discharge himself as that would have left the appellant unrepresented. Tuan Hj Hisyam Teh thus remained on record as counsel for the appellant.

[12] After discharge was refused, we invited Tuan Hj Hisyam Teh to make his
F submissions on the merits of the appeals. He refused. We then proposed that the respondent submit first with a view to providing Tuan Hj Hisyam Teh time to prepare his submission. We asked Tuan Hj Hisyam Teh whether he would
G rely on the submission filed by the appellant in the Court of Appeal. He confirmed that he would rely on them. The respondent commenced their submissions in the morning and we broke for lunch thereafter. After the lunch break, Tuan Hj Hisyam Teh informed the court that 'the correct position is that the court can rely on the appeal records' which would include the submissions
H filed in support of the appeal in the Court of Appeal. Most critically, counsel for the appellant requested for leave to file written submissions in the Federal Court and perhaps to amend the petition of appeal. We duly allowed counsel for the appellant full liberty to do so. Thereafter, the respondent completed their submission for the day and requested to continue the rest of their oral submission on the next day.

[13] On 19 August 2022 (Friday), before the respondent continued with
I their oral submission, Tuan Hj Hisyam Teh informed the court that the appellant had of his own accord, discharged his solicitors Messrs Zaid Ibrahim Sufflan TH Liew & Partners. Tuan Hj Hisyam Teh and his supporting counsel were present in court throughout the hearing. By the end of the day, the respondent completed their oral submission on the appeals.

[14] At this point, it bears repeating that first, on 18 August 2022, Tuan Hj Hisyam Teh stated that he would rely on the submissions filed in the Court of Appeal. He then stated that this court could instead, as a matter of course rely on those submissions as they comprise part of the records of appeals. Counsel then asked for permission to file written submissions, and if need be, amend the petition of appeal. At the close of the hearing on 19 August 2022 however, counsel took a different position stating that he would not be making any submission despite the court having given him the opportunity to do so.

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[15] In fact, we asked counsel on 19 August 2022 (Friday) if he would submit on Tuesday, 23 August 2022 which was the next date fixed for hearing. Tuan Hj Hisyam Teh stated that he would not be submitting. We clarified whether this included even oral submission, and counsel confirmed that he would not be making any submission on any of the 94 grounds of appeal in the petition of appeal, even oral submission. We told counsel that he had at least three days to prepare (that is the weekend and the Monday of 22 August 2022). He, despite this, and despite having asked for leave to file a written submission, took the position that he will not submit. This morning (23 August 2022), counsel again confirmed that he will not be making any submission on the appeal. This again, is in spite of his previous request to file a written submission.

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[16] In the circumstances, we cannot but conclude from the above facts that counsel, having been given every opportunity to make submissions on the merits of the appeals, refused to do so.

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Duty of the court in the absence of submissions from the appellant

[17] The question, in light of counsel for the appellant's refusal to make any submission is, how the court should proceed with the disposal of these appeals. In this vein, the respondent advanced the following authorities:

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- (a) *Mohd Zulkifli bin Md Ridzuan v Public Prosecutor* [2014] 1 MLJ 257;
- (b) *Nordin Hamid & Co v Pathmarajah & Anor* [1990] 2 MLJ 308;
- (c) *Go Pak Hoong Tractor and Building Construction v Sykt Pasir Perdana* [1982] 1 MLJ 77;
- (d) *Mohamed bin Abdullah v Public Prosecutor* [1980] 2 MLJ 201;
- (e) *Public Prosecutor v Tanggaah* [1972] 1 MLJ 207;
- (f) *Tan Teow Swee v Regina* [1955] 1 MLJ 76; and
- (g) *Hayati bte Aizan v Public Prosecutor* [2000] 1 MLJ 359.

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[18] The appellant's counsel distinguishes the above cases on the facts. He

- A invited the court to consider the case of *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 underscoring his point the denial of his right to submit amounts to a denial of the appellant's right to a fair trial. He then submitted that this right to a fair trial included a right for counsel to adequately prepare his submission, thereby entitling him to an adjournment. However,
- B *Lee Kwan Woh*, is not authority for the proposition that an appellant is entitled to an adjournment to prepare an effective and meaningful submission. Unlike *Lee Kwan Woh*, this is not a case where the appellant was denied a right to submit as suggested by counsel. On the contrary, learned counsel was invited repeatedly to submit but persistently refused to do so. We reiterate our grounds
- C when refusing the prior application for an adjournment.

- [19] None of the authorities cited deal with the specific situation where an application for discharge has been refused in the exercise of the inherent jurisdiction of the court. In other words, not being discharged, Tuan Hj
- D Hisyam Teh is under a continuing duty to protect the appellant's prosecution of the appeals by submitting on the merits of the same. The authorities cited to us do however deal with cases where the accused himself is: (1) absent; or (2) left without his counsel; or (3) counsel continues to represent the accused but is absent on the day fixed for trial or hearing. It has been held in those cases that
- E the courts may still refuse to grant an adjournment and may proceed with and dispose of those cases even in the absence of the appellant or counsel. The proceedings in those cases were not vitiated on account of a breach of natural justice.

- F [20] The principle in those cases, in our view, extends to the present appeals where counsel is present in name and in person but persistently refuses to make any submission despite repeated calls from the court to do so. This is also supported by s 313 of the Criminal Procedure Code which provides as follows:

G *313 Procedure at hearing*

- (1) When the appeal comes on for hearing the appellant, if present, shall be first heard in support of the appeal, the respondent, if present, shall be heard against it, and the appellant shall be entitled to reply.
- (2) If the appellant does not appear to support his appeal the Court may consider his
- H appeal and may make such order thereon as it thinks fit:
- Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction or who does not appear personally before the Court in pursuance of a condition upon which he was admitted to bail, except on such terms as it thinks fit to impose.

- I [21] The above section applies in relation to criminal appeals to the High Court but we see no reason why it ought not to apply analogously to appeals to the Federal Court from the Court of Appeal. The instant appeals mirror a position similar to that envisaged in s 313(2) in that while the appellant and his

counsel are physically present, they deliberately refuse to participate in the appeal hearing. This, in our view, is equivalent to the appellant ‘not appearing to support’ the appeals. In such circumstances, the court is empowered to proceed with the appeals (see also s 92 of the Courts of the Judicature Act 1964).

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[22] Having said that, we shall now proceed to consider the appellant’s appeals by having regard to the appeal records including the petition of appeal setting out no less than 94 grounds of appeal, the submissions filed in the Court of Appeal and the written judgments of the High Court and the Court of Appeal. In so doing, we find it necessary to state the settled role of this court as the final and apex Court of Appeal.

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The role of the apex appellate court

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[23] We do not consider it necessary to reproduce the charges or repeat any of the facts which have been adequately stated and analysed in the judgments of the High Court and the Court of Appeal. The High Court judgment is reported in *Public Prosecutor v Dato’ Sri Mohd Najib bin Hj Abd Razak* [2020] 11 MLJ 808 while the Court of Appeal judgment is reported in *Dato’ Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2022] 1 MLJ 137.

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[24] The learned trial judge undertook an extensive analysis of all the evidence — documentary and oral that surfaced before him over the 86 or so days of trial. The Court of Appeal meticulously examined these findings and found no appealable errors.

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[25] The role of the apex court, as is settled law, is not to make any new findings of fact on the evidence on record or to substitute those findings with its own. In this regard, where there are concurrent findings of fact by the courts below, the apex court would not be inclined to disturb those findings unless it can be shown that they are perverse, for example, if it can be shown that those findings were made in the absence of any evidence supporting them (see *Puganeswaran all Ganesan & Ors v Public Prosecutor and other appeals* [2020] 12 MLJ 165).

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[26] In light of this, all appellants in criminal appeals must understand that the burden is on them in the apex appellate court to show that the concurrent findings were perverse and that those perverse findings occasioned a miscarriage of justice. In those circumstances, appellate intervention by the apex court is warranted to correct those findings, resulting in an outright acquittal or an order for retrial — depending on the circumstances.

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- A [27] In the present case, the respondent took us through their submissions and illustrated how the findings of the trial judge were supported by the evidence. The respondent argued that a prima facie case was validly established at the close of the prosecution case and that the defence, when called, was adequately considered and found not to raise a reasonable doubt on the prosecution case.
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The appeals

- C [28] In these circumstances, we shall now proceed to state our findings in relation to the appeals. In the absence of any submissions from the appellant, we turn our attention to the 94 grounds of appeal in the petition of appeal. We have examined them carefully and in great detail. In our view they disclose in essence, the following main complaints.
- D [29] Firstly, that the Court of Appeal erred in fact and in law by finding that the High Court judge had correctly found that the prosecution had made out a prima facie case on all seven charges.
- E [30] Secondly, that the Court of Appeal erred in fact and in law by finding that the High Court judge had correctly appreciated the defence. It was argued that the defence managed to raise a reasonable doubt on all seven charges.
- F [31] The respondent, over the course of two full days, took us through the evidence and the High Court's findings in relation thereto. The respondent illustrated how the evidence was so overwhelming that at the close of the prosecution case, the learned trial judge was satisfied in law and in fact that all the ingredients of all the seven charges were satisfied to warrant calling for defence. We have considered these submissions and find that the learned High Court judge undertook a very detailed and objective analysis of the evidence to support his findings at the close of the prosecution case. In the circumstances, we fail to see how and where any of the learned trial judge's findings leading to the ultimate finding that a prima facie case had been made out, are perverse.
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- H The learned trial judge correctly held that all the ingredients of the seven charges were established at the close of the prosecution case. The appellant was thus rightly called upon to enter his defence on all the seven charges.
- I [32] The respondent then took us through the defence case and highlighted how the defence was completely inconsistent and incoherent, and unworthy of belief. During the trial the appellant did not dispute that RM42m entered his personal bank accounts. The thrust of his defence was to challenge the mens rea element, that is, the appellant denied knowledge that the funds were from SRC.

[33] The respondent maintains that the defence was unworthy of belief because, on the one hand, the defence maintained that the RM42m said to have been wrongfully gained by the appellant to the wrongful loss to SRC was not within the knowledge of the appellant. On the other hand, the appellant also maintained that he was framed in a conspiracy hatched by one Low Taek Jho ('Jho Low'), Azlin Alias, Nik Faisal Ariff Kamil, and the bankers. The appellant also maintained the defence that the monies that were credited into his personal AmIslamic bank accounts, ie Accounts 880 and 906 which are the subject of the last six charges, were received from Arab donations from Saudi Arabia. The respondent contended in essence, that they had always maintained at trial that these defences are completely inconsistent and diametrically opposed to one another.

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[34] The respondent also referred to documentary evidence which established that the appellant had expended the RM42m.

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[35] According to the respondent, the learned High Court judge correctly evaluated all the evidence led in relation to the defence and did not believe the defence narrative.

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[36] In our judgment, the findings of the High Court on the defence are correct. In concluding that the defence failed to raise a reasonable doubt on the prosecution case, we find that the learned High Court judge had undertaken a thorough analysis of the evidence produced by the defence.

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[37] Thus, we are unable to conclude that any of the findings of the High Court, as affirmed by the Court of Appeal were perverse or plainly wrong so as to warrant appellate intervention. We agree that the defence is so inherently inconsistent and incredible that it does not raise a reasonable doubt on the prosecution case.

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[38] In the circumstances, and having pored through the evidence, the submissions and the rest of the records of appeal, we find the appellant's complaints as contained in the petition of appeal devoid of any merit. On the totality of the evidence, we find the conviction of the appellant on all seven charges safe. We also find that the sentence imposed is not manifestly excessive.

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CONCLUSION

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[39] These appeals are therefore unanimously dismissed and the conviction and sentence are affirmed.

A *Appeal dismissed and conviction and sentence affirmed.*

Reported by Ashok Kumar

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